SUPREME COURT, U. S.

NOV 22 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

AT WASHINGTON

OCTOBER TERM, 1968.

Number 762

J. P. KIMBRELL, Petitioner

Versus

THE LAWRENCE COUNTY BAR ASSOCIATION,

Noble L. Freemon, Sr., A. D. Lindsey, John F. Morrison, Jr., W. E. Boston, H. I. Carroll, Lloyd Comer, F. F. Locke, Elmer L. Cooke, Robert H. Gay, William A. Harwell and Hiram W. Holtsford, Respondents.

A PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS.

For Petitioner:
J. P. Kimbrell (pro se),
Route No. 1,
West Point, Tenn. 38486

For Respondents:
A. D. Lindsey, Esq.,
Lawrenceburg, Tenn. 38464
Hiram W. Holtsford, Esq.,
Lawrenceburg, Tenn. 38464
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Lawrenceburg, Tenn. 38464

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THE OPINION

The opinion in this case was handed down on August 23, 1968.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to the provisions of 28 U.S. Code, Section 1254(1).

* * * * *

Your petitioner, J. P. Kimbrell, a native born citizen of the United States and a lawful resident, citizen and voter of and in the State of Tennessee and the County of Lawrence, and whose legal residence is West Point, Route Number 1, the same being located within the confines of the said State of Tennessee and the said County of Lawrence, now comes before this honorable Court to pray that a Writ of Certiorari issue to the United States Sixth Circuit Court of Appeals for the purpose of reviewing and reversing the judgment of the said Sixth Circuit Court of Appeals in its action to dismiss an action brought by Petitioner on appeal from the United States District Court at Columbia.

Petitioner would represent to this Court that, on August 4, 1966, he was duly, legally and constitutionally elected by the voters of Lawrence County, Tennessee, to be judge of the Court of General Sessions for the said Lawrence County; that the results of the election were not called in question by anyone; that the Lawrence County Election Commission issued to petitioner a Certificate of Election, and that the then-governor, the Honorable Frank G. Clement, issued to petitioner the proper commission and mailed it to him by first class mail addressed to him at Lawrenceburg, in care of the Courthouse, where it was seized by unauthorized persons, rifled and held for twenty-one days without the knowledge or consent of your petitioner.

Petitioner would further represent that, on August 8, 1966, the Lawrence County Bar Association, under the presidency of one A. D. Lindsey, filed a suit in Chancery Court designed to prevent petitioner from assuming the duties of the office to

which he had been elected, which suit was illegally and unconstitutionally decided against petitioner solely on the strength of Section 12 of Chapter 55 of the Private Acts of 1943, which reads:

> "Be it further enacted, That there shall be a judge for said court, who shall be a person licensed to practice law in Tennessee, and with all other qualifications and the same term of office as provided by the Constitution of the State of Tennessee for inferior courts; and the oath shall be the same as that prescribed for Circuit Judges and Chancellors.

Petitioner contended that this Section was unconstitutional as it relates to the qualifications of the judge of the court, as the State Supreme Court had held **(Kivett v. Mason, 185 Tenn. 558; 206 SW2d 789)** until its departure from Constitutional precedent in 1963 **(LeFever v. Ware, 211 Tenn. 393; 365 SW2d 44).** However, in the case then at bar **(Atlas Perry v. The Lawrence County Election Commission, 411 SW2d 538),** the Court ignored all previous pronouncements of constitutionality and defended its own precedent set in 1963 and declared the Section constitutional despite the fact that it had been vigorously knocked down as unconstitutional in **Kivett v. Mason** in 1947. The Court only referred back to **LeFever v. Ware,** in which the court contended that (1) the Legislature was empowered to set qualifications above and beyond those established by the Constitution and (2) that usages and customs of long standing carried much weight in the determination of what could and what could not be considered constitutional. The usages and customs in this case were of almost three years standing! No one except the Bar Associations ever accepted this interpretation of the Court, but it was the end of the road insofar as the State was concerned.

Although the State Court usurped the power to alter and/or enlarge upon the provisions of the State Constitution, it was evident that it was not empowered to alter the Federal Constitution. All the rights which had been violated by the Bar Association were federally protected rights and should never

have been handled in a State Court. However, in an effort to get a Federal Court judgment on the issues involved, petitioner appealed to the United States Supreme Court for a Writ of Certiorari to the State Supreme Court, which appeal was denied for reasons which the subordinate clerks of the High Court refused to divulge. Inquiry elicited the reply that the Court was privileged to deny anything it pleased without giving any reason for it. Petitioner then filed a new action in the District Court at Nashville (Columbia Division) asking that the Federal Courts assume jurisdiction and defend their own Constitution, seeing that the Federal Constitution had been violated along with the State Constitution. On March 1, 1968, the District Court refused to assume jurisdiction and dismissed the action without a hearing, which was a violation of the rights of any citizen who might want or need to bring a legitimate complaint before the Courts. Thereupon, your petitioner appealed to the Sixth Circuit Court at Cincinnati for a review and reversal of the judgment of the District Court.

It was during the long wait for a promised hearing in Cincinnati that the matter became more and more complicated. A. D. Lindsey, President of the Lawrence County Bar Association, had been appointed to sit on the Court when petitioner was denied his right to take office. Another election was approaching and a judge of the court would have to be elected. Petitioner was a candidate against Judge Lindsey and won the election. In this case, the courts were never resorted to. The Election Commission, being instructed by the Attorney General, disregarded all votes cast for petitioner and certified Lindsey's election. As the time for swearing-in ceremonies approached, petitioner made a motion for an advanced hearing before the Court at Cincinnati. The defendants-Appellees replied to the motion by asking for a dismissal of the action, waiving the right to oral argument and asked that judgment be had on the basis of the material in hand. Plaintiff-Appellant immediately replied to the REPLY TO MOTION and challenged the right of the defendants-appellees to waive oral argument on behalf of plaintiff-appellant, but the Court dismissed the action before receiving the protest.

Petitioner registers the complaint that he has been deprived of an office to which he has been twice elected and that such deprivation is both illegal and unconstitutional. He contends that the District Court at Columbia and the Sixth Circuit Court of Appeals at Cincinnati have been in error in refusing to accept jurisdiction in a matter involving rights which are federally protected. Petitioner is much aggrieved over the action of the District Court and the Court of Appeals, for which reason he comes before this Court and files this petition for a Writ of Certiorari to bring this case and the record therein before this Court for review and reversal.

ARGUMENT AND BRIEF

The questions at issue in the case at bar are exceedingly simple and require only simple answers. They have to do with constitutional processes from first to last and the confusion in which this case is now enveloped is due to the fact that a greater effort is being made to void the Constitution than to honor its provisions and guarantees. If anything is clear, it is that the founders of this country laid down some simple principles by which orderly government would bring justice to all citizens. Where those principles have been recognized, order has prevailed; where they have been violated, confusion has been confounded.

The only question at issue is whether a citizen who is not a practicing attorney is legally and constitutionally elibile to hold the office of judge of the General Sessions Court of Lawrence County, or any other county, for that matter; whether the members of the local Bar can gather to themselves complete power over the judiciary to say who may and who may not sit as judge of an inferior court. The issue was settled in the Constitutional Convention of 1787 and should have remained settled for all time to come. It was when men inordinately greedy for power sought to break out of the restrictions placed around all men by the Constitution that trouble began. The present generation of lawyers have either never

known the high principles enunciated by our founding fathers or have chosen to void them as a matter of convenience to themselves.

That there should be certain qualifications for electors and the elected is not open to question. Our founding fathers knew this well and did not shirk their responsibilities in the matter. On August 10, 1787, this very question was being argued vociferously by the Constitutional Convention. It was not a question of whether there should be qualifications for electors and the elected but what agency should determine those qualifications. Delegate Ellsworth presented the view that the fewer restrictions placed upon electors and the elected the better it would be for all, and he even went so far as to suggest that he saw little reason for the Convention to fret over such matters, since their determination could well be left to the discretion of the State Legislatures. It was here that the discussion became heated. Quoting the Journal of the Convention:

> Mr. Madison was opposed to the section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and the elected were fundamental articles in a republican government and ought to be fixed by the Constitution. If the Legislature could regulate the qualifications of either electors or the elected, it could by degrees subvert the Constitution. A republic may be converted into an aristocracy or an oligarchy as well by limiting the number capable of being elected as the number authorized to elect . . . Qualifications founded on artificial distinctions may be devised by the stronger to keep out partisans of a weaker faction.

Delegate Williamson took the floor to say that "should a majority of the legislature be composed of any particular description of men, of lawyers, for example, which is no improbable supposition, the future elections might be secured to their own body." All of us have lived to witness a fulfillment of this prophetic look into the future. We have seen the Legislatures filled with lawyers and we have also seen those lawyers attempting to force by legislative decree the election of those

of their own number to fill seats on inferior courts. Delegate Madison arose again to observe that the British Parliament possessed the power to regulate the qualifications of both electors and the elected; and the abuse they had made of it was a lesson worthy of our attention, for they had made the changes in both cases subservient to their own views or to the views of political or religious parties. To-day, the lawyers have used the power of the Legislature to usurp the power of the Constitution and are demanding that they, themselves, be empowered to monopolize the courts by having only themselves elected as judges. On August 14, 1787, the Constitutional Convention brought the issue to a vote and the motion to vest all power to regulate the qualifications of electors and the elected in the Constitution, itself, rather than entrust it to the discretion of the Legislature carried almost unanimously.

Pursuant to the guidelines thus established by the Convention, the delegates wrote into the Constitution certain qualifications for electors and the elected. However, they were wisely careful to confine themselves to qualifications having to do with age and residency. Nowhere can we find any qualifications which go beyond that. If any citizen had reached the age required by the Constitution and had lived in the country, state and district the required number of years, further qualifications to vote or hold office could not be required of him. Everything else was left to the discretion of the voters. These qualifications were constitutional principles and were beyond the power of the Legislature to alter or amend.

When the states came into the Union upon the presentation of their respective Constitutions, these Constitutions were required to be in agreement with the Federal Constitution and its provisions. It is a well known fact to all who study such things that the Constitution of Tennessee agrees with the Federal Constitution in that it lays down the same qualifications for electors and the elected that the Federal Constitution lays down; that is, it confines itself to questions of age and residency. And the Legislature is powerless to alter these qualifications despite the fact that the State Court has ruled that "the Legislature possesses the necessary power and author-

ity to add to these qualifications provided it does so on a reasonable basis" **LeFever v. Ware, 211 Tenn. 393; 365 SW2d 44).** The Court failed to hazard a guess as to how or where the Legislature came into possession of this additional power or to define the "reasonable basis" upon which its additional power might be predicated. It is the contention of your petitioner that there is no basis, reasonable or otherwise, upon which such additional power can be predicated. If these qualifications are fundamental articles in the Constitution of a republican government, then the Legislature cannot obtain any such additional powers except by usurpation.

In his **Constitutional Limitations,** 8th Edition, Vol. 1, p. 139, Judge Cooley nailed down this constitutional principle when he said:

> "Another rule of construction is that when the Constitution defines the circumstances under which a right may be exercised, the specification is an implied prohibition against legislative interference to add to the condition."

The Federal Constitution has defined the circumstances under which a citizen may vote or hold office, and those circumstances relate only to age and residency. When the Legislature undertakes to add to the condition of age and residency, it overreaches its constitutional limitations and its action is clearly unconstitutional. When the State Legislature of Tennessee passed a Private Act which specified that the judge of the General Sessions Court of Lawrence County must be a practicing attorney, it added a third condition relating to occupation or profession, which it was not empowered to do under the provisions of either the State or the Federal Constitution. Section 12 of Chap. 55 of the Private Acts of 1943 is therefore unconstitutional in that it violates the circumstances under which a federally protected right may be exercised. And this Section is the only basis upon which your petitioner's right to sit as judge of the Lawrence County Court has ever been challenged.

On Page 627 of **Elliot's Debates,** we read: "if any act of Congress or the Legislature of a state violates the constitutional provisions, it is unquestionably void." Section 12 violates the constitutional provisions relating to age and residency and is therefore "unquestionably void."

Treating the matter at more length, the **Debates,** pp. 626-627, become more explicit. We read:

> "The Constitution of England is at the mercy of Parliament. Every act of Parliament is transcendent and must be obeyed . . . In America, the case is widely different. Every state in the Union has its Constitution reduced to written exactitude. A Constitution is the form of government delineated by the mighty hand of the people, in which certain principles of fundamental law are established. The Constitution is certain and fixed; it contains the permanent will of the people and is the supreme law of the land; it is paramount to the power of the Legislature and can be revoked or altered only by the power that made it. The life-giving and the death-dealing stroke must proceed from the same hand. The Legislatures are the creatures of the Constitution; they owe their existence to the Constitution; they derive their power from the Constitution. It is their commission, and therefore all their acts must be conformable to it, or else they will be void. The Constitution is the will or work of the people, themselves, in their original unlimited and sovereign capacity. Law is the work or will of the Legislatures, in their derivative and subordinate capacity . . . The Constitution fixes limits to the exercise of legislative authority and prescribes the orbit in which it must move. Whatever else may be the case in other countries, yet in this there can be no doubt that every act of the Legislature repugnant to the Constitution is absolutely void."

Judge Cooley adds a lusty Amen to the mighty chorus of witnesses when he says:

> "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now. Those things which are written within its grants of power, as those

> grants were understood when made, are still within them; and those things not within them remain still excluded."

On the strength of the foregoing, we contend that the constitutional restriction of the qualifications of electors and the elected to age and residency must remain as untouchable constitutional principle and beyond the power of the Legislature to alter or amend. Such being the case, Section 12 of Chapter 55 of the Private Acts of 1943 was not within the power of the Legislature to impose, and the imposition of this Section was repugnant to the Constitution and, therefore, void. Every attempt to alter or amend the Constitution by legislative enactment is repugnant to the Constitution, no matter how many courts may rule that "the Legislature possesses the necessary power and authority to add to the constitutional qualifications as long as it does so on a reasonable basis." These efforts on the part of anyone to alter the Constitution by legislative or judicial decree are repugnant to the Constitution and it is the responsibility of the Court so to declare it.

The Appeals Court made two errors here: First, it based its judgment on the fact that the State Supreme Court had declared Section 12 to be constitutional but made no inquiry of its own as to the constitutionality of the Section. Second, it took the position that no federal question was involved, when, in fact, only federal questions are involved.

The case at bar is not an appeal from the decision of any State Court. It is an action begun in the Federal Courts on behalf of federally protected rights which have been flagrantly violated by the State Courts. There is reason for interest here in the case of Gomillion v. Lightfoot (364 U.S. 339), which brings out and emphasizes a fact which cannot be sneered off. In this case, the Court observed:

> "When a state exercises power wholly within the domain of state interest, it is insulated from Federal judicial review. But such insulation is not carried over when state power is used as an instru-

ment for circumventing a federally protected right."

No state can confer upon any man the right to vote or hold public office, neither is it the final obligation of the state to defend such rights. They are inherent in the federal structure and must be defended by the federal courts. The State of Tennessee has used state power to circumvent a federally protected right, which is the basis of our contention. We reiterate that both federal and state Constitutions have laid down qualifications for electors and the elected, and those qualifications are limited by both Constitutions to age and residency. Under no circumstances can a State Legislature enlarge upon those qualifications, and this is the point at issue here. The Tennessee Legislature has passed a Private Act which adds its own additional qualifications to those of the Constitution. In doing so, it not only illegally and unconstitutionally amended its own Constitution but also did violence to the federal Constitution and used the power of the state to circumvent a federally protected right. If this is not a federal question, then there are no federal questions. And this is exactly the question which was before the Appeals Court.

Some of the constitutional questions governing the rights in question had a baptism of fire in 1966, when the case of **Bond v. Floyd (385 U.S. 116; 87 Ct. 339)** was in litigation in Georgia. In this case, the high Court slapped down a state effort to deprive an elected official of his office. No matter what local prejudices may run counter to the Court's decision, the Court was compelled to uphold the constitutional and civil rights of its citizens under the provisions of the Constitution and it will be obliged to do that until the Constitution is altered, not by a Legislature but by the people, themselves. That the final responsibility in these matters lies with the Federal Courts is evident from the fact that the Constitution of Tennessee provides that no white and colored children may be taught together in any tax-supported school, but the federal courts took jurisdiction here and forced the states to follow federal statutes. Not only so, but the Constitution of Tennessee forbids interracial marriage but the federal courts assumed jurisdiction

and forced the states to abandon that section of their respective Constitutions. The states at one time made the payment of a poll tax a pre-condition to the right of franchise, but the federal courts, in the case of **The United States v. The State of Texas,*** wiped out that provision on Feb. 9, 1966 by the decision of a three-judge panel sitting at Austin. Your petitioner insists that the federally protected rights of the citizen must be upheld by the federal courts anywhere and under any circumstances. Otherwise, the citizen is left to the mercy of petty state and county politics and becomes the helpless victim of a courthouse judiciary.

If Section 1 of the XIVth amendment to the Federal Constitution means anything, it means that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the law." The powers of the State of Tennessee are being used as a weapon to abridge the federally protected rights of your petitioner in that only a small number of counties in the state have attempted to place unconstitutional restrictions upon the right of the citizen to hold any office to which the people will elect him. Some forty-odd counties in the state have non-lawyers sitting as judges of inferior courts. Some counties do not have a lawyer within their confines, for which reason, if for no other, it would be impossible to have a lawyer sitting as judge of such a court. In the more populous counties where inferior courts have become 'going' and 'paying' concerns, unconstitutional Private Acts have been devised to deprive the citizen of the rights denied him by the XIVth Amendment and to protect the "interests" of the conniving politician. This is the only question involved in the case at bar: A citizen, twice elected as judge of a General Sessions Court and twice barred from taking office, is testing to see whether his constitutional rights can be denied him by a Private Act devised to protect those who would plunder his rights. The fact that non-lawyer judges have been seated in three counties by the State Court

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*The Law Library in Nashville was not able to locate this case in the reporting services and an inquiry to the District Court in Austin brought no reply.

and barred in two others is an outright denial of the doctrine of the equal protection of the law and no legalistic jugglery can change the fact that your petitioner has been, and is being, denied the civil rights guaranteed him by both State and National Constitutions.

Your petitioner offers no further citations. No others are necessary. Many questions involved here cannot be answered by citations to the reporting services. However, here are some of the facts upon which many questions and answers to them must be predicated:

(1) Any citizen of the United States may serve as President of the United States for the purpose of enforcing all the laws of the nation without be...g a lawyer. Age and residency are the only qualifications.

(2) Any citizen may serve as vice-President of the United States without being a lawyer. Age and residency are the only qualifications.

(3) Any citizen may serve as ambassador to a foreign power with no restricting qualifications.

(4) Any citizen may serve as a judge or justice of any superior or inferior state or federal court without being a lawyer. Age and residency are the only qualifications.

(5) Any citizen may serve as a United States Senator and help make the laws of the land without being a lawyer. Age and residency are the only qualifications.

(6) Any citizen may serve as a congressman and help make the laws of the land without being a lawyer. Age and residency are the only qualifications.

(7) Any citizen may serve as governor of any state without being a lawyer. Age and residency are the only qualifications.

And these are fundamental articles fixed by the authors of the federal Constitution and placed beyond the power of any Legislature to alter or amend. The question which the Court must decide is this: If every elective and appointive office, both in the state and nation, is open to any citizen who meets

the age and residency requirements, how can the two Tennessee Counties of Lawrence and White enforce a legislative requirement that the judge of an inferior court be a lawyer by profession? The answer is that they cannot do so. It is only by the most sordid political collusion that they have been able to wield this power and to strip the voters of those counties of the constitutional right to elect whom they please to be judges of their courts. It is a highhanded usurpation of power and it is the obligation of the Federal Courts to deal with it. It must not be forgotten that the Constitutional Convention of 1787 warned us that "a republic may be converted into an aristocracy or an oligarchy as well by limiting the number capable of being elected as the number authorized to elect."

The premises considered, your petitioner prays:

First, That a Writ of Certiorari issued from this honorable Court to the Sixth Circuit Court of Appeals, directing said Court and the clerk thereof to certify and transmit to this honorable Court the entire record and proceedings in this case, including the opinion and judgment of the Sixth Circuit Court of Appeals;

Second, That this honorable Court accept jurisdiction and adjudicate this case on its legal and constitutional merits to the end that the injustices and inequities complained of may be cured;

Third, That your petitioner be ordered inducted into the office to which he was twice elected and from which he was twice barred, and that all salaries now in arrears be paid in full;

Fourth, That petitioner have all such other and general relief as he may be entitled to under the Constitution of the United States, and

Fifth, That, in view of the urgency of the situation, petitioner be given an immediate oral hearing on this complaint.

(Signed) J. P. KIMBRELL
Petitioner.